

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
June 20, 2007 Session

**IN RE ESTATE OF PAULINE HILL**

**Appeal from the Probate Court for Claiborne County  
No. P-1854 Billy Joe White, Chancellor**

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**No. E2006-01947-COA-R3-CV - FILED NOVEMBER 30, 2007**

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This is an appeal of a will contest. Pauline Hill (“the Deceased”) died in 2001 at the age of 72. She was predeceased in death by her husband, Maynard. At an earlier time, and following the death of her husband, a conservatorship was established for Mrs. Hill. This occurred in 1982. Her brothers, Willard, Lloyd, and Russell Cosby, were designated as her conservators. On April 24, 1992, the Deceased executed what purports to be a will. Later in the same year, her original conservators were removed and her guardianship was vested in Marty Cosby. After the Deceased died in 2001, her brother, Russell, and a nephew, Larry Cosby (“the Contestant”), filed papers seeking appointment as the administrators of her estate. An order of administration was entered in the trial court on or about August 21, 2001. On October 12, 2001, a niece of the Deceased, Glenda Elliott (“the Proponent”), filed a petition to probate in solemn form the Deceased’s purported 1992 will. The will named the Proponent as executrix. The Proponent further requested that the order of administration previously issued at the request of the Cosbys be revoked. In their answer to the petition for probate in solemn form, the Cosbys denied that the 1992 will was valid and asserted various affirmative defenses, which put at issue the Deceased’s competency and whether the will was properly witnessed. On August 13, 2004, the Contestant filed a motion for summary judgment, suggesting that the appointments of guardians in 1982 and 1992 established that the Deceased was incompetent at the time the will was executed. He further asserted that the affidavit of Melba R. Webb, a witness to the will, showed that the will was void. He contended that Ms. Webb did not realize she was witnessing a will. On December 14, 2005, after hearing argument, the trial judge determined that the issues raised made out a will contest. The court denied the Contestant’s motion for summary judgment. A jury subsequently found the will to be valid. The will was admitted to probate. The Contestant appeals. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court  
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Robert Asbury, Jacksboro, Tennessee, for the appellant, Larry Cosby.

Lee Dan Stone, III, Tazewell, Tennessee, for the appellee, Glenda Elliott.

## OPINION

### I.

The Deceased died without surviving children. At the time of her death, she owned real property valued at approximately \$100,000. Her 1992 will was prepared by an attorney. It provides as follows:

#### Last Will and Testament OF PAULINE HILL

I, PAULINE HILL, of Claiborne County, Tennessee, being of sound mind and disposing memory, do hereby make and publish this my Last Will and Testament, revoking all previous wills, if any.

FIRST: I desire and direct that all my just debts including my funeral expenses and the expenses of the administration of my estate be first paid out of the first funds coming into the hands of my Executrix.

SECOND: I give, devise and bequeath all of my estate, both real and personal, to my three (3) nieces, namely: Irene Sly, Glenda Elliotte [sic] and Lula Winkleman, all of Wayne County, Michigan, share and share alike.

In the event that any of my nieces named herein predecease me, then their children shall take their respective share.

THIRD: I nominate and appoint my niece, Glenda Elliotte [sic] as sole Executrix of this my Last Will and Testament and direct that she serve as such without bond.

IN TESTIMONY WHEREOF, I have hereunto set my signature this the 24th day of April, 1992.

s/ Pauline Hill  
TESTATRIX

Signed by the said Pauline Hill, as and for her Last Will and Testament, in the presence of us, the undersigned, who, at her request and in her sight and presence, and in the presence of each other, have

subscribed our names as attesting witnesses the day and date above written.

ATTESTING WITNESSES:

ADDRESSES:

s/ Pauline M. Brooks

Route 2, Harrogate Tenn.

s/ Melba R. Webb

P.O. Box 923 Harrogate, Tn

(Capitalization and underlining in original; s/ indicates signatures). An "Affidavit of Attesting Witnesses" accompanied the will:

STATE OF TENNESSEE  
COUNTY OF CLAIBORNE

AFFIDAVIT OF ATTESTING WITNESSES

The undersigned, being first duly sworn, make oath that they are the attesting witnesses to the Last Will and Testament of Pauline Hill, Testatrix, dated the 24th day of April, 1992; that the Testatrix signed said instrument and acknowledged same to be her Last Will and Testament in their presence; and that they signed the instrument in the presence of the Testatrix and at her request and in the presence of each other.

This Affidavit is executed at the request of the Testatrix.

The undersigned have been informed that this Affidavit may be introduced into evidence in the probate of said instrument.

And further affiants say not.

s/ Pauline M. Brooks

s/ Melba R. Webb

Sworn to and subscribed before me this \_\_\_\_ day of April, 1992.

\_\_\_\_\_  
Notary Public

My Commission Expires:

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(Capitalization and underlining in original). As can be seen, the affidavit was not notarized.

## II.

The issues raised by the Contestant present the following questions:

1. Did the trial court err when it denied summary judgment in this case where the Deceased previously had been adjudicated incompetent, thereby creating a presumption of lack of testamentary capacity, and where one of the witnesses to the purported will swore under oath that she did not sign the will in the presence of the Deceased and the other witness, and that she did not know she was witnessing a will?
2. Was there sufficient evidence for the jury to find that the Deceased had the requisite testamentary capacity to execute a will?
3. Was there sufficient material evidence for the jury to determine that the will was properly executed?
4. Should interested witnesses to the execution of the will be allowed to take more than their intestate share if the will is proved by their testimony?

The Contestant contends that the witness Melba R. Webb was “apparently tricked into putting her signature on the document” and “was not in the presence of Pauline Hill nor . . . in the presence” of the other witness when she signed the document. The Contestant also asserts that the Proponent and possibly others obtained the signatures of both witnesses “by fraud and trickery.” The Proponent of the will argued at trial that there were two issues in this case: whether the will was properly executed and whether the Deceased was competent to make a disposition of her property.

## III.

Our standard of review of a judgment predicated upon a jury verdict is limited to determining whether there is material evidence to support the jury’s verdict. Tenn. R. App. P. 13(d). The appellate courts neither determine the credibility of witnesses nor weigh the evidence on an appeal from a jury verdict. *Conatser v. Clarksville Coca Cola Bottling Co.*, 920 S.W.2d 646, 647 (Tenn. 1995). When the record contains material evidence supporting the verdict, the judgment based on

that verdict will not be disturbed on appeal. *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822, 823 (Tenn. 1994).

#### IV.

##### A.

In his first issue, the Contestant argues that the trial court erred in failing to grant his motion for summary judgment. This is an issue that cannot be raised at this juncture in the proceedings. “A trial court’s denial of a motion for summary judgment, predicated upon the existence of a genuine issue of material fact, is not reviewable on appeal when a judgment is subsequently rendered after a trial on the merits.” *Bradford v. City of Clarksville*, 885 S.W.2d 78, 80 (Tenn. Ct. App. 1994); *see also Cortez v. Alutech, Inc.*, 941 S.W.2d 891, 893 (Tenn. Ct. App. 1996). Therefore, we decline to review the propriety of the trial court’s order denying the Contestant’s motion. Hence, this issue is found adverse to the Contestant.

##### B.

The second matter raised by the Contestant is focused on the issue of the Deceased’s testamentary capacity.

Under Tennessee law, a testator is presumed to have the capacity to execute a will. *Taliaferro v. Green*, 622 S.W.2d 829, 835 (Tenn. Ct. App. 1981) (overruled on other grounds by *Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn. 1995)). Therefore, the burden of proof in a will contest is always upon the contestant to demonstrate suspicious circumstances or lack of testamentary capacity at the time of the execution of the document. *Keasler v. Estate of Keasler*, 973 S.W.2d 213, 217 (Tenn. Ct. App. 1997).

A valid will is the product of the free exercise of independent judgment by a person who has the mental capacity to make a testamentary disposition. *See In re Estate of Elam*, 738 S.W.2d 169, 171 (Tenn. 1987). To execute a valid will, the testator’s mind “must be sufficiently sound to enable him or her to know and understand the force and consequence of the act of making the will.” *Id.* The testator must be able to comprehend “the property being disposed of, the manner of its distribution, and the persons receiving it.” *In re Estate of McCord*, No. M2003-00175-COA-R3-CV, 2004 WL 508479, at \*6 (Tenn. Ct. App. M.S., filed March. 12, 2004) (quoting *Brewington v. Sanders*, No. 01A-01-9301-CV-00002, 1994 WL 189626, at \*4 (Tenn. Ct. App. M.S., filed May 18, 1994)).

In examining whether a testator has testamentary capacity to execute a valid will, the “testator’s mental condition ‘at the very time of executing the will is the only point of inquiry; but evidence of mental condition both before and after making the will, if not too remote in point of time, may be received as bearing upon that question.’” *Id.* (quoting *Harper v. Watkins*, 670 S.W.2d 611, 628-29 (Tenn. Ct. App. 1984)). Further,

[w]hile evidence regarding factors such as physical weakness or disease, old age, blunt perception or failing mind and memory is admissible on the issue of testamentary capacity, it is not conclusive and the testator is not thereby rendered incompetent if her mind is sufficiently sound to enable her to know and understand what she is doing.

*Elam*, 738 S.W.2d at 171-72 (citing *American Trust & Banking Co. v. Williams*, 225 S.W.2d 79, 83 (Tenn. Ct. App. 1948); 79 Am.Jur.2d *Wills* § 77 (1975)). “The mere fact that a person may have been under judicially appointed guardianship or conservatorship does not constitute [a] per se adjudication that the person lacked [the] capacity to make and execute a valid will.” *Green v. Higdon*, 870 S.W.2d 513, 522 (Tenn. Ct. App. 1993). “The law does not require that persons must be able to dispose of their property with proper judgment and discretion in order to make a will . . . . It is sufficient that they understand what they are [doing].” *Thomas v. Hamlin*, 404 S.W.2d 569, 574 (Tenn. Ct. App. 1964).

Individuals who execute wills must, at the moment of execution, understand what they are doing and the consequences of their action. Executing a will requires less mental capacity than engaging in a business transaction. *In re Estate of Park*, No. M2003-00604-COA-R3-CV, 2005 WL 3059443, at \*7 (Tenn. Ct. App. M.S., filed November 14, 2005).

Undue influence “upon a testator consists in substituting the will of the person exercising it for that of the testator.” 1 Jack W. Robinson, Sr. & Jeff Mobley, *Pritchard on the Law of Wills and the Administration of Estates* § 124, at 203 (5th ed. 1994). The essential issue on a question of undue influence is whether “the will is the will of the testator or that of another.” *Id.* at § 130, at 210. “[I]t is not influence that vitiates a will, but undue influence . . . .” *Union Planters Nat’l Bank v. Inman*, 588 S.W.2d 757, 761 (Tenn. Ct. App. 1979).

As a general rule, it is presumed that undue influence does not enter into the making of a will, or other conveyance, and the burden of proving undue influence falls upon the person contesting the document. *Hammond v. Union Planters Nat’l Bank*, 222 S.W.2d 377, 383-84 (Tenn. 1949). Proof of due execution shifts the burden of going forward to the contestant to prove that the testator was unduly influenced in making his or her will. *Elam*, 738 S.W.2d at 173.

An allegation that a testator was unduly influenced must be shown by the existence of suspicious circumstances warranting a conclusion that the will was not the testator’s free and independent act. See *Mitchell v. Smith*, 779 S.W.2d 384, 388 (Tenn. Ct. App. 1989). Whether the circumstances relied upon by the contestant are sufficient to invalidate a will should be “decided by the application of sound principles and good sense to the facts of each case.” *Halle v. Summerfield*, 287 S.W.2d 57, 61 (Tenn. 1956). Once the contestant presents sufficient evidence to substantiate his or her undue influence claim, the proponent of the will must present clear and convincing evidence that the challenged transaction or testamentary disposition was fair. See *Matlock*, 902 S.W.2d at 386.

Without direct evidence of undue influence, persons contesting a will must prove the existence of more than one suspicious circumstance in order to succeed. See *Halle*, 287 S.W.2d at 61. Contestants commonly make out a claim of undue influence by proving the existence of a confidential relationship between the testator and beneficiary, the testator's physical or mental deterioration, or the beneficiary's active involvement in procuring the will. See *Mitchell*, 779 S.W.2d at 388-89. A confidential relationship is one "where confidence is placed by one in the other and the recipient of that confidence is the dominant personality, with the ability, because of that confidence, to influence and exercise dominion over the weaker or dominated party. . . ." *Iacometti v. Frassinelli*, 494 S.W.2d 496, 499 (Tenn. Ct. App. 1973). The existence of a confidential relationship, followed by a transaction where the dominant party receives a benefit from the other party, gives rise to a presumption of undue influence. *Matlock*, 902 S.W.2d at 386. Once a contestant presents sufficient evidence to substantiate an undue influence claim, the proponent of the will must present clear and convincing evidence that the challenged transaction or testamentary disposition was fair in order to rebut the presumption of undue influence. *Id.*

The testimony at trial reveals that, after the death of the Deceased's husband, her three brothers, Willard, Lloyd, and Russell Cosby, obtained an order of guardianship with respect to her pursuant to T.C.A. § 34-4-101 (now repealed). The letters of guardianship dated May 5, 1982, read, in pertinent part, as follows:

To Willard Cosby, L[l]oyd Cosby and Russell Cosby, . . . citizen[s] of Claiborne County, . . . Pauline C. Hill, a mental incompetent, and the Court being satisfied as to your right to the guardianship . . . and you having given bond and qualified according to law, and the Court having ordered that letters of Guardianship be issued to you for the use and benefit of said ward, the profits of the lands, tenements, and hereditaments belonging to said Pauline C. Hill, and also the goods, chattels, and other personal estate of the said ward . . . ."

(Underlining in original). The Deceased was thereafter maintained in various boarding houses, caretaking homes, and two nursing homes. While the Deceased had local relatives, including the three brothers named as her guardians, visits from family were rare. It appears she was occasionally visited by three nieces: the Proponent, Lula Winkleman, and Irene Sly. They are the three named beneficiaries in the will.

During an April 1992 visit to Tennessee, Ms. Winkleman, a resident of Michigan, discovered that the Deceased was living in deplorable conditions at a place called "Isaac's." She described the house as having one bedroom where four to five cots were placed. She indicated that the home had no screen doors and, because an outhouse was located across a road, the residents used buckets for their personal wastes. As to "why in the world" Mrs. Hill had been left in "a place like that, for ten years," Ms. Winkleman stated that

you would have to ask them [sic] guardians about that because they must have been the ones that put her there. They put her out of society is what they done [sic].

Ms. Winkleman indicated that “[the Deceased] wouldn’t have needed the guardian if she could have had help with getting her groceries, get[ting] her clothes, [and] pay[ing] her bills.” Ms. Winkleman claimed that just prior to the Deceased being placed at Isaac’s back in 1982, the farm residence had been “livable” and the Deceased “was living in it.”

Ms. Winkleman recalled spending considerable time with her aunt when she was growing up in Claiborne County. She testified that in later years, whenever she would visit Tennessee, she would take the Deceased out to dinner, to visit with family, and to the cemetery. Ms. Winkleman described her aunt as a quiet woman, who enjoyed taking long walks, attending church, and visiting others. She said that the Deceased in April 1992 – when the will was executed – was the same as she had always been. According to Ms. Winkleman, the Deceased recognized her nieces each time they visited. Ms. Winkleman claimed to have never seen any behavior from the Deceased that made her question her aunt’s mental health and stability. She stated that “when Pauline was with me Pauline was normal.”

Ms. Winkleman asserted that she had attempted to take the Deceased to Michigan, but she had been informed by a judge that she could not “take her out of the state.” She claimed that she was unable to do anything for the Deceased back in 1982 because she was warned then that “[i]f you do anything you are going to be shot.” She noted that the Deceased could not have lived in her own home in 1992 because, at that point, “[i]t wasn’t fit to live in.”

During their April 1992 visit, Ms. Winkleman and her sister, Ms. Sly, took the Deceased along with them to visit the Deceased’s brother and the sisters’ father, Willard, who lived at Tri-State Manor Nursing Home. According to the nieces, while they were there, the Deceased informed them that she would like to live at Tri-State in order to be close to Willard and, as a hoped-for consequence, enjoy improved living conditions.<sup>1</sup> Ms. Winkleman and Ms. Sly made immediate efforts to admit the Deceased to Tri-State Manor. That evening, instead of returning the Deceased to Isaac’s, the nieces kept their aunt with them until they could satisfy the nursing home’s admission requirements.<sup>2</sup> According to the nieces, the Deceased personally answered all of the questions asked of her at the admission interview, and she was placed at the nursing home that very week.

During Ms. Sly’s testimony, she agreed that the Deceased was a quiet woman who lived simply, but “knew everything she had.” Ms. Sly opined that her aunt was “about the same in 1992

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<sup>1</sup>“The testator’s conversations and declarations, together with any particular fact from which the condition of the testator’s mind at the time of making the will may be inferred, are competent on the issue of testamentary capacity.” *Eden*, 99 S.W.3d at 90.

<sup>2</sup>During the process, they discovered that the Deceased had not been receiving Medicare benefits; they applied for those on her behalf.

as she had been in 1982.” She confirmed the testimony of Ms. Winkleman that during the visit at Tri-State, the Deceased informed them that Isaac’s was “a bad place” and inquired whether she had enough money to live at the nursing home.

According to Ms. Winkleman and Ms. Sly, the Deceased subsequently informed them that she desired to be buried next to her husband and inquired about making a will. The following day, Ms. Winkleman made an appointment with William R. Stanifer, a local attorney requested by her aunt. The two sisters accompanied the Deceased to Mr. Stanifer’s office, where the attorney met privately with her in a separate room for 15 to 30 minutes. According to Ms. Winkleman and Ms. Sly, after emerging from the meeting, Mr. Stanifer prepared the will. However, by the time that the will was completed and reviewed, no one was available in the office to witness it. Mr. Stanifer then gave the will to the Deceased, after advising her that the will did not have to be signed in his office. She immediately passed it to Ms. Winkleman. The three women then left the attorney’s office, had lunch, visited the cemetery, and returned to the nursing home.

On the following day, the Deceased was picked up at Tri-State by Ms. Winkleman and Ms. Sly for transportation to a doctor’s appointment. Upon leaving the doctor’s office, the Deceased was left in the company of the Proponent.<sup>3</sup> Ms. Winkleman and Ms. Sly left to prepare for their return trip to Michigan. The Deceased, again in possession of the will, gave the will to the Proponent and requested her assistance in getting it executed. According to the Proponent, the will still had no signatures on it at that juncture. Ms. Elliott telephoned Mr. Stanifer to inquire as to how she should proceed.

Later that same day, at the Deceased’s request, Ms. Elliott and her husband, Harold, took the Deceased by the cemetery. They picked up the Deceased’s old friend and neighbor, Pauline M. Brooks, along the way. According to the Proponent, on the return trip to the nursing home, they stopped by Forge Ridge Market to purchase a drink for the Deceased and some items for the Proponent’s father. At the market, they encountered Melba R. Webb, who was known to both the Deceased and the Proponent. Ms. Elliott testified that the Deceased recognized Ms. Webb and inquired whether Ms. Webb and Mrs. Brooks could sign her will as witnesses. After Ms. Webb agreed to be a witness to the will, Mrs. Brooks was also asked. According to the Proponent, in the presence of each other, the Deceased signed her will, followed by Mrs. Brooks and Ms. Webb signing as witnesses. Mr. Elliott testified that he observed the exchange among the Deceased and the witnesses.

The Proponent indicated at trial that she now lives in Tazewell, having returned to Tennessee from Michigan. She noted that when she came to Tennessee for visits, she would always visit with the Deceased. In regard to the Deceased’s health, the Proponent reported no visible physical infirmities and found that she conversed normally. In the Proponent’s opinion, the Deceased could have cared for herself initially with some help. The Proponent noted that the Deceased had her own

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<sup>3</sup>In 1992, Ms. Elliott, along with Ms. Winkleman and Ms. Sly, was a resident of Michigan. During the April 1992 period at issue, Ms. Elliott and her husband were staying in Tennessee longer than her sisters.

home, income, and a farm. Because the Deceased could not drive, the only help she would have needed from local family members was assistance paying bills and shopping. According to the Proponent, however, the Deceased had been “thrown away” by her local relatives.

Later in 1992, with the financial support of her nieces, the Deceased sought to have the guardianship dissolved through a petition. It appears that her brother Willard wanted to be relieved of his responsibility for her. However, her request to dissolve the guardianship was not granted. Rather, on October 23, 1992, a probate judge appointed Marty Cosby, the Deceased’s great-nephew, as her new guardian. Interestingly, the order provided as follows:

That the Probate Judge admonish the newly appointed guardian that he is not to remove Pauline Hill from the home where she is currently residing in Morristown without just and reasonable cause and to avoid incurring expenses that would unnecessarily result in a sale of her real estate.

\* \* \*

That the guardian shall not take any action that would encumber or dispose of real estate owned by Pauline Hill without giving notice and an opportunity for hearing to all next of kin.

At trial, the Deceased’s final guardian, Marty Cosby, testified that while he had known the Deceased his entire life, he only really became acquainted with her after being appointed guardian. It appears he took his responsibilities as guardian seriously, visiting with the Deceased at least monthly, making sure that she had spending money and clothing, and moving her to Laurel Manor Nursing Home in LaFollette when it appeared that she had been mistreated at a group home residence in Morristown. Mr. Cosby described the Deceased as a quiet woman who had been “bounced around” since her husband’s death. According to Mr. Cosby, the Deceased always recognized him when he visited her from 1992 until her death in 2001, and she often would ask him about his wife and other family members. He testified that while he recalled visiting her at Lakeshore when he was a child, he was never aware of the reason why she required a caretaker.

In support of the contention that the Deceased lacked testamentary capacity, the Contestant described visiting her at Lakeshore in the 1980s, at which time he thought she was “in bad shape.” He claimed that at that visit, his aunt did not recognize her brother (the Contestant’s father, Willard) and asked her visitors where she lived. He indicated that it was his belief that the Deceased suffered from a mental illness because those “problems” run “in our family.” Mr. Cosby claimed that she had been shifted around among different facilities because “she had nowhere else to go.” While he asserted that he had visited her perhaps once a year and that she had sometimes recognized him, he admitted that he had never visited her during her ten-year stay at Isaac’s.

Michael Cosby, a social counselor for the Tennessee Department of Human Services, claimed to have come into contact with his great aunt probably three or four times during her stay at Laurel Manor. Mr. Cosby recalled the Deceased always called him Marty, his brother's name, and that she always wanted a cigarette. According to Michael Cosby, he accompanied the Contestant and his father to the group home in Morristown to get the Deceased because she had run away from the residence and had been found without her clothes. This would have occurred in 1994. After claiming that the Deceased had never engaged in a meaningful conversation with him, he admitted to having no one-on-one contact with the Deceased in 1992, the year in which she executed her will.

The Contestant presented medical testimony from Juanita Honeycutt, a licensed practical nurse and nursing administrator, who had encountered the Deceased professionally at Tri-State and Laurel Manor. Ms. Honeycutt noted that the admission documentation from Tri-State indicated that the Deceased had been diagnosed with adult onset diabetes, chronic depression, and cerebral insufficiency, although no records concerning these conditions existed at the facility by the time of this litigation. Ms. Honeycutt agreed that the Deceased's diagnoses did not equate automatically to incompetence.

Observing that the Deceased had required assistance with all of her activities of daily living, Ms. Honeycutt claimed that the Deceased "might look at somebody like they were familiar but as far as calling them by name she couldn't do that." She opined that the Deceased was "not usually" aware of what she was doing and "didn't understand a lot of things that you said to her." According to Ms. Honeycutt, there were never periods of time when the Deceased became totally oriented. She further noted that the Deceased was known to take off her clothes at inappropriate times, wanted to smoke all of the time, and would take things like soft drinks from the other residents. She admitted, however, that she could not state that on April 24, 1992, the Deceased was incompetent to execute a will. She further indicated that when the Deceased was discharged from Tri-State on September 11, 1992, her prognosis was pronounced as "good."

Despite the fact that from 1992 until her death in 2001, Mrs. Hill had been treated by at least four different physicians, no medical records were submitted to support or contradict the claim that the Deceased lacked testamentary capacity.

As noted in *In re Conservatorship of Groves*, 109 S.W.3d 317 (Tenn. Ct. App. 2003),

[c]apacity is . . . situational and contextual, and it may even have a motivational component. It may be affected by many variables that constantly change over time. These variables include external factors such as the time of day, place, social setting, and support from relatives, friends, and supportive agencies. It may also be affected by neurologic, psychiatric, or other medical conditions, such as polypharmacy, many of which are reversible with proper treatment. Finally, capacity is not necessarily static. It is fluid and can fluctuate from moment to moment. A change in surroundings may affect

capacity, and a person's capacity may improve with treatment, training, greater exposure to a particular type of situation, or simply the passage of time.

*Id.* at 334 (footnotes omitted). *Groves* goes on to define capacity as encompassing two concepts: functional capacity and decision-making capacity:

Functional capacity relates to a person's ability to take care of oneself and one's property. Decision-making capacity relates to one's ability to make and communicate decisions with regard to caring for oneself and one's property.

*Id.* In particular,

[d]ecision-making capacity involves a person's ability (1) to take in and understand information, (2) to process the information in accordance with his or her own personal values and goals, (3) to make a decision based on the information, and (4) to communicate the decision. Requiring that decisions be tested against a person's own values and goals reflects the importance of determining a person's capacity in light of his or her own habitual standards of behavior and values, rather than the standards and values of others. A person does not lack decision-making capacity merely because he or she does things that others either do not understand or find disagreeable. Foolish, unconventional, eccentric, or unusual choices do not, by themselves, signal incapacity. However, choices that are based on deranged or delusional reasoning or irrational beliefs may signal decision-making incapacity.

*Id.* at 335-36 (footnotes omitted).

In this case, there were disputed material facts. From the evidence presented, more than one conclusion could have been drawn as to the issues presented. The rule is well settled that where the evidence is in conflict, as here, and there is material evidence both ways on fact questions, this Court will not disturb the jury's verdict. *East Tenn. & W.N.C.R. Co. v. Gouge*, 203 S.W.2d 170, 171 (Tenn. Ct. App. 1947). Taking the strongest legitimate view of the evidence in the light most favorable to the verdict, as we are required to do, we find material evidence to support the jury verdict (1) that the Deceased had the capacity to execute a will and (2) that the execution of the will was her voluntary act, free of the undue influence of others.

C.

The Contestant next argues that the Deceased failed to properly execute the will.

The proper execution of a will requires compliance with T.C.A. § 32-1-104 (2001) which states as follows:

The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two (2) witnesses as follows:

(1) The testator shall signify to the attesting witnesses that the instrument is testator's will and either:

- (A) The testator sign;
- (B) Acknowledge the testator's signature already made; or
- (C) At the testator's direction and in the testator's presence have someone else sign the testator's name; and
- (D) In any of the above cases the act must be done in the presence of two (2) or more attesting witnesses.

(2) The attesting witnesses must sign:

- (A) In the presence of the testator; and
- (B) In the presence of each other.

The presence of an attestation clause in a will creates a rebuttable presumption that the recitations in the attestation clause regarding the will's execution are true and correct and that the will was properly executed. See **Jackson v. Patton**, 952 S.W.2d 404, 406-07 (Tenn. 1997); **In re Estate of Ross**, 969 S.W.2d 398, 400 (Tenn. Ct. App. 1997); **Whitlow v. Weaver**, 478 S.W.2d 57, 63 (Tenn. Ct. App. 1970). Any effort by an attesting witness to undermine the accuracy of the recitals in a duly signed attestation clause should be viewed with suspicion. **Whitlow**, 478 S.W.2d at 62.

Under circumstances where a witness claims not to remember signing a will, it is proper for the matter to be referred to the jury, so that the jury may weigh all of the evidence and determine if the attesting witness spoke the truth at the time he or she signed the attestation clause of the will or at the time of the trial. **Id.** A witness's denial that the will was properly witnessed merely serves to rebut a presumption that the will is valid and creates a jury question. **Id.**

According to the testimony of the Proponent, Ms. Sly, and Ms. Winkleman, the Deceased expressed her desire to have a will prepared, to execute it, and to have it witnessed. Nothing in their testimony supports a conclusion that the Deceased suffered from a lack of testamentary capacity on the days leading up to the will being prepared and executed.

Attorney David Stanifer, the son of the attorney who prepared the will at issue, identified the document as having been prepared on stationery from the family's law firm and on a typewriter in use at their office in 1992. He indicated that while it was unusual for an unsigned will to be taken from the office and that he could find no record pertaining to the preparation of a will for the

Deceased in the firm's records, he could not testify as to what his father, incapacitated at the time of trial, had done.

One of the witnesses to the will – Mrs. Brooks – had passed away in November 1999. Her signature on the will was identified by her son, Tom Brooks. Mr. Brooks testified that his mother had always lived in the Forge Ridge community. He said that she was a teacher in the Claiborne County school system for more than 30 years. Her son further noted that Mrs. Brooks had never mentioned the will to him, thus indicating to him that nothing suspicious had happened with respect to the will's execution. The Contestant admitted that Mrs. Brooks was a “good woman” who enjoyed a good reputation in the community and was an individual who would not have knowingly done anything improper. While he theorized that Mrs. Brooks may have been tricked into signing the will, he produced no evidence at trial to substantiate that theory.

The second attesting witness, Ms. Webb, identified her signature and her correct 1992 address on the document, but claimed that she did not remember where the document had been signed or who was present when she signed it. She did not remember the will, could not recall if there were other signatures on it when she signed it, did not know if she had ever met Mrs. Brooks, and was unable to say if the Deceased had asked her to sign as a witness to the will. At trial, Ms. Webb read aloud to the jury the “Affidavit of the Attesting Witnesses,” a document that contains a signature that she acknowledges is hers:

The undersigned being first duly sworn make oath that they are the attesting witnesses to the last will and testament of Pauline Hill, dated the 24th day of April, 1992. That the testatrix signed said instrument, acknowledged [same] to [be] her last will and testament in their presence, and that they signed the instrument in the presence of the testatrix . . . and at her request and in [the] presence of each other. This affidavit is executed at the request of the testatrix. The undersigned ha[ve] been informed that the affidavit may be introduced into evidence in the probate of said instrument.

As with respect to other matters in this case, the issue of whether the will was properly executed pursuant to the statute was hotly contested and there was material evidence on both sides of that issue. However, for our purposes, the only question is whether there is material evidence to support the jury's verdict and there clearly is. This issue is also found adverse to the Contestant.

#### D.

The Contestant contends that the beneficiaries under the will — the three nieces of the Deceased — should be limited to their respective intestate shares. He relies upon T.C.A. § 32-1-103(b) (2001), which provides as follows:

No will is invalidated because attested by an interested witness, but any interested witness shall, unless the will is also attested by two (2) disinterested witnesses, forfeit so much of the provisions therein made for the interested witness as in the aggregate exceeds in value, as of the date of the testator's death, what the interested witness would have received had the testator died intestate.

The Contestant misapprehends the import of this provision. The statute only applies, by its language, to attesting witnesses – those that signed the will as witnesses. Neither the Proponent nor her sisters signed the will as attesting witnesses. The terms of the statute are simply not implicated. This issue is found adverse to the Contestant.

V.

The judgment of the trial court admitting the will of Pauline Hill to probate in solemn form is, in all things, affirmed. This case is remanded to the trial court for such further proceedings, if any, as may be required. Costs on appeal are taxed to Larry Cosby.

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CHARLES D. SUSANO, JR., JUDGE